

Susan



Montana Legislative Services Division
Legal Services Office

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May 31, 2011

Ms. Kate Ord
Director of Communications
Concerned Citizens Montana
P.O. Box 453
Dillon, MT 59725

Re: Proposed Referendum for HB 198.

Dear Ms. Ord,

On May 18, 2011, the Legislative Services Division received notice of your submission of a proposed referendum to refer House Bill 198, enacted as Chapter 321, Laws of 2011, to the electorate. This letter constitutes the Legislative Services Division's review of the proposed referendum for HB 198.

Article III, section 5, of the Montana Constitution, which allows qualified electors to approve or reject by referendum any act of the legislature except an appropriation of money, provides:

Referendum. (1) The people may approve or reject by referendum any act of the legislature except an appropriation of money. A referendum shall be held either upon order by the legislature or upon petition signed by at least five percent of the qualified electors in each of at least one-third of the legislative representative districts. The total number of signers must be at least five percent of the qualified electors of the state. A referendum petition shall be filed with the secretary of state no later than six months after adjournment of the legislature which passed the act.

(2) An act referred to the people is in effect until suspended by petitions signed by at least 15 percent of the qualified electors in a majority of the legislative representative districts. If so suspended the act shall become operative only after it is approved at an election, the result of which has been determined and declared as provided by law.

As stated by the Montana Supreme Court, Article III, section 5, of the Montana Constitution "expresses the will of the majority in Montana on the matter of allowing referenda to be placed on the ballot and allowing the suspension of laws which are referred to the people." *Nicholson v. Cooney*, 265 Mont. 406, 414, 877 P.2d 486, 490 (1994).

Referenda are governed by Title 13, chapter 27, of the Montana Code Annotated, MCA, the Legislative Services Division reviews issue and ballot statements "for clarity, consistency, and conformity with the Montana Constitution."

Legislative Council Meeting
June 24, 2011

Exhibit 7

of the bill drafting manual furnished by the legislative services division, the requirements of 13-27-312, and any other factors that the staff considers when drafting proposed legislation." Under 13-27-312(4), ballot statements **may not be arguments** or written so as to **create prejudice** for or against the issue. In addition, ballot statements must "express the true and impartial explanation of the proposed ballot issue in plain, easily understood language". Section 13-27-312(4), MCA. A ballot statement (statement of purpose) explains the purpose of the ballot issue and may not exceed 100 words. 13-27-312(2)(a), MCA. Statements of implication explain the implications of voting for or against a particular ballot issue and may not exceed 25 words. 13-27-312(2)(b), MCA.

Ballot statements must comply with the requirements of 13-27-312, MCA. Importantly, 13-27-316, MCA, does not grant proponents the "right to a ballot statement of their choosing." See *Citizens Right to Recall v. State*, 2006 MT 192, ¶ 13, 333 Mont. 153, ¶ 13, 142 P.3d 764, ¶ 13. The Montana Supreme Court has clarified on several occasions that "a statement that explains the measure in ordinary and plain language, is true and impartial, and not argumentative or likely to create prejudice for or against the measure constitutes compliance with the statute." See e.g. *Wenzel v. Murray*, 178 Mont. 441, 448, 585 P.2d 633, 637 (1978).

Please note that ballot statements are also subject to review for compliance with 13-27-312, MCA, by the Attorney General. Pursuant to 13-27-312(8)(c), MCA, the Secretary of State "may not deliver a sample petition form unless the attorney general's opinion is overruled pursuant to 13-27-316 and the attorney general has approved or prepared ballot statements under this section."

I. Statement of Purpose

Because the statement of purpose is the title of the petition that is circulated to the electorate and the ballot title if the issue is placed on the ballot, the significance of providing true, impartial, and easily understood statements cannot be overstated. The electorate is entitled to know the true purpose of a ballot issue and what the implication of a vote in favor or against the issue will be.

The language you proposed for the referendum on HB 198 is as follows:

A CITIZEN PETITION TO REPEAL HOUSE BILL (HB) 198

In December 2010, a Montana court ruled that state law does not give a foreign company that is not subject to public regulation the right to use Montana's eminent domain regulation for its corporate venture. HB 198 retroactively overturns the court's ruling and extends the right to use Montana's eminent domain regulation to entities without requiring them to submit to public regulation.

This referendum will repeal HB 198 and restore the careful and longstanding

balance between the use of eminent domain for necessary public projects and the protection of Montana's fundamental private property rights.

FOR ☐ A vote for this referendum favors repealing HB 198.

AGAINST ☐ A vote against this referendum opposes repealing HB 198.

With this language in mind, I have several concerns regarding whether the proposed statement of purpose meets the statutory requirements of 13-27-312, MCA. First, the focus of the statement of purpose is misplaced. A referendum on an act of the legislature is the process of referring the act to the electorate for final approval or rejection. However, instead of focusing on the text of HB 198, the language proposed for the statement of purpose focuses on the Ninth Judicial District Court's order in *MATL LLP v. Salois* (Cause No. DV-10-66, Glacier County) that dismissed a complaint for condemnation of certain Montana lands. While the dismissal of the complaint for condemnation may have precipitated the introduction and passage of HB 198, the decision should not be referenced in the statement of purpose given that the sole purpose of the referendum is to refer HB 198 to the electorate for approval or rejection.

Even assuming arguendo that it is appropriate to reference or describe the District Court's decision in the MATL case, the proposed statement of purpose is potentially misleading and confusing. The first sentence states that in 2010, a Montana court ruled that "state law does not give a foreign company that is not subject to public regulation the right to use Montana's eminent domain regulation for its corporate venture." First, nowhere in the order dismissing the complaint for condemnation does the District Court state specifically that Montana law "does not give a foreign company that is not subject to public regulation the right to use Montana's eminent domain regulation". The District Court stated that "MATL does not possess the power of eminent domain, either express or implied, and it has no authority to take the private property of a nonconsenting landowner." See page 7 of the Order Dismissing the Complaint for Condemnation issued on December 12, 2010. Depending on how broadly or narrowly one construes the opinion, it is equally possible to interpret the order as providing only that a private merchant transmission line of the type at issue in the MATL case does not possess the power of eminent domain. This is precisely the problem with including an interpretation of a court decision in a statement of purpose for a referendum on a legislative act.

In addition, the first sentence of the proposed statement of purpose references "a Montana court" without clarifying that the order was issued by a district court instead of the Montana Supreme Court. This is significant because a district court decision is not binding beyond the boundaries of the district itself. The MATL case is currently on appeal to the Montana Supreme Court, which is not referenced in the description. The selective reference to "a Montana court" is potentially misleading to voters who could assume that the order came from the Montana Supreme Court.

The second sentence of the proposed statement of purpose is equally troublesome. The second sentence provides that "HB 198 retroactively overturns the court's ruling and extends the right to

use Montana's eminent domain regulation to entities without requiring them to submit to public regulation." The use of the word "extends" implies that the power of eminent domain did not previously exist for this type of entity, which is at issue in the appeal of the MATL case to the Montana Supreme Court. As described, it is also not clear as to what "entities" the power "extends to" under the proposed language.

In addition, the portion of the second sentence stating that the "entities" at issue would not be required to "submit to public regulation" is inaccurate. The Department of Environmental Quality (DEQ) is responsible for assessing and issuing certificates of compliance that may be necessary under the Major Facility Siting Act (Title 75, chapter 20, MCA). Certain entities or projects (such as the MATL project) may also be subject to federal regulation by the Federal Energy Regulatory Commission (FERC). DEQ is a state agency that reviews and assesses environmental permits for compliance with state environmental laws. FERC is an independent federal agency that regulates interstate transmission of natural gas, oil and electricity. Because the term "public regulation" necessarily includes governmental policies and regulations such as the Major Facility Siting Act, it is inaccurate to state that the entities at issue would not be subject to public regulation.

The third and final sentence, which provides that "[t]his referendum will repeal HB 198 and restore the careful and longstanding balance between the use of eminent domain for necessary public projects and the protection of Montana's fundamental private property rights" should be deleted. A referendum to refer an act of the Legislature is not a "repeal" as that term is commonly understood. As the Montana Supreme Court explained in *Fitzpatrick v. State Board of Examiners*, 105 Mont. 234, 240, 70 P.2d 285, 297-288 (1937):

An Act of the legislature, when it is referred, voted upon by the people, and by them disapproved, thereby becomes ineffective from the beginning, not because the people repealed it, but because it lacks the approval of a constitutional branch of the legislative department (emphasis added).

In addition, the language regarding the restoration of "the careful and longstanding balance between the use of eminent domain for necessary public projects and the protection of Montana's fundamental private property rights" is partial, argumentative, and likely to create prejudice against HB 198. This type of language would be more appropriate in the voter information pamphlet published by the Montana Secretary of State's office, in which both opponents and proponents may offer arguments regarding ballot issues.

Pursuant to the authority in 13-27-202(2)(b), MCA, I recommend that the statement of purpose be rewritten to provide as follows:

House Bill 198, which passed the Montana legislature and took effect on May 9, 2011, states that a public utility as defined in 69-3-101, MCA, and a person issued a certificate pursuant to the Major Facility Siting Act (Title 75, chapter 20, MCA),

may acquire by eminent domain any interest in property. Voters must determine whether to approve or reject House Bill 198. Section 6 of House Bill 198 extends the effect of the bill to certificates issued after September 30, 2008.

II. Statements of Implication

As stated above, the statements of implication explain the implications of voting for or against a particular ballot issue. The same requirements that apply to a proposed statement of purpose apply to statements of implication. In other words, the statement of implication must clearly and concisely indicate to the electorate what the result of a vote in either direction will be. The proposed statements of implication, as drafted, provide as follows:

FOR ☐ A vote for this referendum favors repealing HB 198.

AGAINST ☐ A vote against this referendum opposes repealing HB 198.

These statements are confusing and potentially inaccurate. As noted above, a referendum of a legislative act such as HB 198 is not a repeal of the bill. The referendum is put to the voters for approval or rejection. In addition, phrasing the "against" statement as a vote that opposes repealing HB 198 is simply confusing. Because a vote on the referendum is either to accept or reject HB 198, the statements should be rewritten as follows:

FOR ☐ Approving House Bill 198.

AGAINST ☐ Approving House Bill 198.

Please note that pursuant to 13-27-202(1)(d), MCA, you are required to respond in writing to this office accepting, rejecting, or modifying the recommended changes before submitting a sample sheet of the petition to the Secretary of State. Your response will terminate the role of this office in this process. Further correspondence should be submitted to the Secretary of State.

Sincerely,



Helen C. Thigpen
Staff Attorney

c: Secretary of State Linda McCullough

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